Letter to Secretary of State from Acas Chair in response to DTI’s consultation:


The Acas Council welcomes the opportunity to contribute to the debate on informing and consulting employees in the wake of the government’s most recent consultation document on the subject. It would particularly like to re-affirm something that it believes is in danger of being lost sight of in the detailed discussion of the proposed ICE Regulations. It is the fundamental importance of effective information and consultation arrangements in improving organisations and working life, which is Acas’ core mission. The day-to-day experience of Acas staff that comes from involvement in workplaces across the country constantly reminds us that information and consultation are the basic building blocks of good employment relations. Employment rights and management decisions are never automatic in their effect. Critically important is that it is the dialogue that information and consultation makes possible that breathes life into the employment relationship, whether or not a trade union is recognised.

To paraphrase and summarise the many Acas statements on the subject, effective information and consultation can:

- improve management performance;
- improve employees’ performance and commitment;
- improve organisational performance;
- help the management of change;
- increase job satisfaction;
- promote flexible working and a better 'work-life balance';
- encourage personal development.

Further confirmation of many of these points can be found in Acas’ recently published *Information and Consultation at Work: From Challenges to Good Practice*, which reports the experiences of Acas advisors in the field.

This letter is not just a statement of principle, however, but also an opportunity to bring you up-to-date with the practical steps that Acas is taking to ensure that effective information and consultation are given the priority they deserve. As you may know, Acas has been holding a series of roundtables around the country at which employers, trade union and others involved in the world of work have been expressing their views on the subject. I am very pleased to be able to let you have a summary of the feedback. Although primarily intended to help Acas in its preparations for dealing with the implementation of the new legislation, I hope you will find it a useful contribution to your consultation exercise.

In the light of the feedback from the round tables and the earlier research report, Acas will not just be helping companies to adjust to the new requirements, but also building on the opportunity to raise their performance through improved employment relations. At the forefront of our efforts will be our *Promoting Good Practice* activities. Both before and during the implementation of the regulations, Acas will be running seminars throughout Great Britain aimed specifically at organisations that are affected. In addition to detailing the legal requirements, the seminars will outline and encourage good practice. It is very likely that many organisations will be looking to
renew and refresh their existing information and consultation arrangements before the new regulations come into effect. Much of our effort during 2004 and the early part of 2005 will therefore be devoted to helping these organisations come to agreements that meet their needs and satisfy the requirements of the new regulations. Central to this assistance will be new advisory materials providing practical advice and guidance on negotiating agreements which we aim to publish towards the end of 2003.

Towards the end of 2004 we will turn our attention to helping smaller organisations with no information and consultation arrangements to meet the requirements of the new regulations. We will also be producing a new advisory booklet aimed specifically at helping small organisations not directly covered by the new regulations. This booklet will promote the benefits to be gained from informing consulting employees as well as looking at some of the practical issues involved in communicating with staff.

Whilst much of our help during the early stages of the implementation of the regulations will be focussed on training seminars and guidance publications, we will be backing this up during 2005/06 with a tailor made on-line training package designed to allow managers and employees and their representatives to find out more about the new requirements at a time and place to suit them. These training materials will complement and build on the lessons we have learnt with our existing on-line package dealing with discipline and grievance.

We will also be looking to put more resource into advisory projects aimed at helping organisations implement the regulations. These projects provide in-depth assistance to companies through a process of working groups. With our help, managers, employees and their representatives are encouraged to analyse and discuss workplace issues and problems agree their own solutions. This emphasis on joint working not only helps ensure commitment to the eventual outcomes but can also encourage a more general spirit of partnership working within the organisation. As well as focussing on information and consultation, we will also be looking to target the assistance we provide through advisory projects more specifically on helping organisations develop partnership working and manage change. Both are key issues in the improvement of workplace performance and productivity.

There is one final point I would like to make. Many participants in the Acas round tables have said that they would welcome a statutory code dealing with the proposed regulations. Acas stands ready to produce such a code if and when you should ask us to do so. However, our view is that, for the immediate future, it is the kind of good practice advice and guidance I have outlined above that is most needed. In particular, everything that can be done should be done to encourage employers and employees to reach agreement about the arrangements appropriate to their circumstances. For it is in this way that the 'voluntarism', which has been such a dynamic force in UK employment relations, is most likely to be re-invigorated.
Implementing the Information and Consultation of Employees Regulations: Feed back from the Acas round tables

Introduction

1. Throughout September and October Acas held a series of round tables up and down the country at which representatives from companies, employers' organisations, Chambers of Commerce, trade unions and regional agencies considered the practical implications of the proposed Information and Consultation of Employee (ICE) Regulations. In some cases, academics from the IR/HR departments of local universities were also involved. A major objective was to raise awareness and promote dialogue as well as gather views and opinions that Acas could feed into the DTI’s consultation exercise and its own preparations for dealing with the implications of implementing the ICE Regulations. Further details of the round tables, which numbered 17 in total, will be found in Annexe 1 along with the questions discussed in Annexe 2.

2. This paper, which has been prepared by Acas' Strategy and Research and Evaluation Units, is a factual account of the comments made at the round tables. It does not represent the views of the Acas Council or, indeed, of its authors.

3. No attempt has been made to 'correct' misunderstandings of the proposed Regulations or existing legislation, although Acas staff and/or other participants often did so during the round tables. A key point of the exercise was to capture views, opinions and understanding, favourable or unfavourable, helpful or unhelpful, right or wrong.

4. The paper begins with the responses to the three outstanding issues on which the DTI specifically asked for comments. It proceeds to other issues that participants raised and the advice and guidance they felt they needed. It concludes by relaying their views on the major practical challenges they see facing the implementation of effective information and consultation arrangements.

Undertakings, groups of undertakings and establishments

5. It was generally appreciated that the government had had a choice between ‘establishment’ and ‘undertaking’. There was a widespread recognition, too, that such was the complexity of UK corporate structure that any level would have given rise to problems. Many organisations in the modern business world were based on complex company structures and deciding which part was an ‘undertaking’ for the purposes of information and consultation would not be easy. To quote but one of the several examples that were given, an HR manager described how her organisation was based around four separate companies which each had a separate legal identity. However, for business and commercial reporting purposes these four companies were joined into one. To add to the complications from an operational point of the view, the four companies were broken down into a number of individual business units.

6. Several trade union representatives said they wanted the DTI to re-visit the choice between ‘establishment’ and ‘undertaking’. Their preference would have been for ‘establishment’, which they felt would have been practicable and would have meant many more employees being covered. Other participants queried why ‘employer’ could not be used in discussing the practical levels that arrangements might be introduced, as it was a term people were used to dealing with in connection with trade union recognition.
7. Much of the ensuing discussion of this issue merged into that on the impact on existing arrangements. Management representatives from some multi-establishment companies that based their current arrangements on establishments were worried that focusing on the undertaking would lead to demands for company level negotiations – several from engineering, for example, did so. Others were worried that the proposed Regulations implied that there had to be arrangements above the establishment level. There were particular concerns about a multiplicity of tiers emerging and the costs involved, that there would be complications in reporting back and a loss of ’buy-in’ to the outcomes of consultation at levels removed from individual employees and managers. Coming at the issue from a very different perspective, however, both management and trade unions in companies with structures embracing a group of undertakings were worried that they would be destabilised if the trigger mechanism was centred on the undertaking. It was the first of many examples of people’s understanding of seemingly the same issue differing fundamentally, depending on their own particular circumstances.

8. As well as clarifying the definition of ’undertaking’ in guidance, more of which below, many said the key point was to emphasise that, while ’undertaking’ was the reference point, this did not mean that this was the level at which arrangements had necessarily to be put in place. It was recognised that the DTI’s document more or less said this, but there was considerable misunderstanding that needed to be taken on board. Indeed, the Regulations should make very clear that the parties should be able to introduce arrangements at the levels that suited their particular circumstances. Several HR managers suggested that a guiding principle should be that consultation should be located at the level at which decisions were made. Effectively, this meant that the establishment would be involved in operational and day-to-day issues in virtually every case. In the multi-establishment and multi-undertaking organisation, however, the undertaking and group of undertakings levels might additionally be involved when it came to strategic issues. It did need to be recognised, however, that in multi-tiered arrangements, the nature and extent of information and consultation would differ very significantly from level to level, reflecting the types of decisions being made.

9. Many of the round tables involved representatives from local government and NHS Trusts, along with public service trade unions such as UNISON. In virtually every case the position of public authorities was therefore raised under this issue – participants wanted to know how public sector organisations would be treated. They also wanted to know quickly so that they could prepare.

The overlap between proposed and existing requirements

Data Protection

10. Several participants raised this. The point was that there could be requests for information that would possibly conflict with the provisions of the Data Protection legislation. It was something that would need to be addressed in any guidance.

Trade union recognition

11. Several trade union officials raised the issue of the overlap between the proposed ICE Regulations and the provisions for statutory trade union recognition. Their concerns were twofold. The first was that employers might set up information and
consultation committees to head off a potential union recognition bid. They said that there had already been some instances of this and they were worried that this practice would escalate. Effectively, they wanted to establish that the setting up of non-union information and consultation committees would not entitle employers to ignore a request for trade union recognition. The second was that employers with existing agreements providing for trade union recognition for collective bargaining purposes might use non-union information and consultation committees to undermine collective agreements. They therefore felt that there needed to be a clear demarcation between the scope of collective agreements (the negotiation of terms and conditions) and the role of the committee (information and consultation).

**Collective redundancies and TUPE Regulations**

12. This was reckoned to be the biggest ‘overlap’ issue by far and a major concern for both management and trade union representatives. This is ‘last minute’ legislation, said one critic. ‘Not adequately thought out’ said another. Many participants said the DTI should have taken the opportunity to introduce consolidated legislation.

13. Time and time again references were made to the inconsistencies in the treatment of key issues - in the numbers and proportions of employees to be consulted; the emphasis on establishments as opposed to undertakings; whether evidence was to be in writing; and time scales for consultation. Under the collective redundancy Regulations, employee representatives had a right to training. In the case of the standard arrangements under the ICE Regulations, however, they did not. Others highlighted the multiple mechanisms to deal with different areas of consultation: this could lead to a situation where different complaints go through different routes (the CAC; the tribunal system) about the same consultation.

14. Even more importantly, said some, was that the overlap was sending entirely the wrong message. The message should be that, in giving better opportunities for developing solutions in advance, ongoing dialogue would better enable the handling of restructuring situations involving redundancy. In effect, though, the difference in treatment of key issues ran the risk of achieving the exact opposite. As things stand, the danger was that employers would continue to comply with the collective redundancy and TUPE Regulations, but ignore the ICE Regulations.

15. The general view was that the DTI needed to think seriously about introducing a Consolidation Bill at some point to bring the draft Regulations for informing and consulting and other aspects of the law on consultation (collective redundancy being the most frequently cited) together into a cohesive whole. In the short run, the ‘vagueness’ of the current draft Regulations was felt to be especially problematic. Inconsistencies needed to be addressed, and where differences could not be resolved, employers would need guidance on which legislation takes precedence.

16. Opinions differed on how practitioners would try to handle the situation until the legal overlap was sorted out. Some believed that the Regulations provided an opportunity for organisations to integrate their existing information and consultation arrangements – indeed, some large companies already did so. Others suggested that it made more sense to have separate channels for general and collective redundancy/TUPE consultation respectively. In this way, it would be possible to maintain a distinction between the handling of contractual issues by negotiation and other issues by general consultation.
Impact on existing arrangements

17. Discussion on this topic took up a substantial part of most round tables – not surprising, given that most of the participants came from organisations with existing arrangements. Many participants accepted that the Regulations offered management and trade unions an opportunity to review and, if necessary, upgrade their current arrangements. Yet while meeting the first stipulation of the Regulations for pre-existing and negotiated agreements, that agreements had to be in writing, seemed relatively straightforward, it was really quite challenging. It did not take into account the massive informality of UK employment relations. In much of the private sector, in particular, such arrangements were very often rooted in custom and practice – they were very informal and not necessarily written down. It was not just a case of SMEs either. Some concern was expressed about the impact the new Regulations might have on ‘partnership agreements’. A number of such arrangements are informally based and rely on mutual trust – some worried that this trust could be lost if arrangements have to be formally written down. Codifying existing arrangements, said others, could be a considerable problem in itself. Very often those involved saw considerable benefit from informality inasmuch as different people could live with their different interpretations. Asking them to codify things might itself create problems they would not otherwise have had.

18. The second stipulation of the Regulations for negotiated agreements, that the arrangements should embrace all employees, also provoked considerable debate. The principle was more or less accepted. It was the practicalities of implementation that were the concern. It was pointed out that few, if any, GB undertakings these days had anything like 100 per cent union membership. It was also widely recognised that there could be difficulties in merging the new requirements with existing TU recognition agreements. This was particularly the case where local trade union representatives have traditionally refused to sit at a single table with non-TU reps (or even with another union in extreme cases).

19. There was a long discussion about how this issue might be best handled in practice. Overall, there was a consensus that it made sense to think in terms of building on existing arrangements. Two main directions, however, were identified, depending on the particular local circumstances. One was to maintain the status quo so far as unionised groups were concerned and develop alternative arrangements for those groups not covered. The other and majority view was that it made more sense to combine information and consultation with existing recognition arrangements. Where these involved separate consultative arrangements, non-union employees should be involved. Where they did not, new arrangements should be introduced in the form of an over-arching information and consultation council or committee. Such arrangements might also be negotiated with existing representatives in the first instance and be approved in a ballot of all employees. Advantages claimed were the avoidance of duplication and mixed messages from parallel arrangements. Some also felt that bringing people together was an important end in itself, notwithstanding the problems raised in the previous paragraph; it might be easier too to maintain the distinction between information and consultation, on the one hand, and negotiation on the other.

20. In some of the round tables management representatives took the opportunity to challenge their trade union colleagues on whether they would be willing to help in introducing mixed constituency information and consultation arrangements. Almost invariably, the response was positive, although there was recognition that there could be difficulties on the ground in some cases. One TU representative said, while there
could be such problems, it was important not to be quite so pessimistic. There were many models already available to draw on. They instanced Whitley arrangements in public services. Long standing arrangements such as these involved a separation of negotiation and consultation, which most people clearly understood. It was also well established that unions represented union and non-union employees alike.

21. In one of the roundtables, the discussion on these points led to an interchange between large company and academic participants on the other hand, and the representatives of Chambers and Commerce and employers’ organisations, on the other, which sheds a great deal of light on how differently the issues are perceived by the various interests. The first group observed that it would be possible to resolve many of the concerns that were being raised by taking advantage of the wide scope of the ICE Regulations to reach agreements to suit particular circumstances. Indeed, subject to some very basic requirements, the parties could do pretty much what they liked. One of the company representatives said this had very much been their EWC experience. They were therefore adopting a very similar approach to the forthcoming ICE Regulations. Many employers said they were currently reviewing their existing UK arrangements in the light of the Regulations with a view to revising and updating them in association with employee representatives. Some of the Employer Organisation/Chamber of Commerce representatives responded that this might be in order for the larger companies but many of their members were small companies which would find such negotiations time consuming and threatening, especially as codifying existing arrangements could be a considerable problem in itself. The major concern of SMEs, they added, was to know more precisely what they would have to do to comply with the Regulations.

22. As well as the specific issues raised by the requirements for pre-existing and negotiated agreements, there were widespread concerns, shared by both management and trade union representatives, that one of the unintended consequences of the Regulations would be to destabilise existing arrangements. Indeed, the point was made several times that the great danger was that Regulations that were designed to encourage the widespread adoption of information and consultation would have a very different effect. It would be like the tail wagging the dog, said one participant. The Regulations would have relatively little impact on employers who did not currently have arrangements for information and consultation or smaller members of employers’ organisations who were not members of employers’ organisations. They could be to the detriment of employers who already had such arrangements, however. Especially galling was that this could be on the basis of a technicality. For some, disquiet centred on the trigger mechanism. It was not just a matter of potential problems between union and non-union groups, with the potential for non-union seeking inclusion in existing union-dominated structures. Disaffected groups - union as well as non-union - might be encouraged to vent their anger with majority decisions by mounting a challenge to existing arrangements. For others, the issue was primarily one of the “representativeness of representatives”, together with relationships between the different tiers in multi-level arrangements. Most trade union representatives, it was pointed out, were trained and accredited. The trade union established a framework within which representatives were expected to work and enjoyed protection, enabling them to speak out. There would not be the same constraints and protection operating in the case of non-union employee representatives. Maverick and self-seeking behaviour could be a major problem.
Other issues and changes recommended

23. The other issues raised are discussed below in the order the relevant Regulations appear. In several round tables, however, there were also general comments about the tone and language of the Regulations. These, it was suggested, were too negative. There were three areas in particular where a more positive and pro-active approach was needed: in stressing the benefits of information and consultation; in emphasising the wider significance of the active involvement of employees as representatives – the comment here was that the Regulations appeared to have been written with the intention of discouraging employees from coming forward as representatives; and in encouraging the negotiation of agreements. Indeed, in the latter case, it was suggested that the DTI use the Partnership Fund not only to support information and consultation training but also the development of negotiated agreements.

Coverage

24. There was a widespread view that, notwithstanding the points made earlier about the complexities involved, the definition of ‘undertaking’ was confusing and needed to be clarified. Also the impression given was there a great deal would rest on court decisions, which created uncertainty. There was a general consensus that legal challenges and case law should be involved if at all possible.

25. Several trade union representatives queried why the Regulations were based on ‘employees’ as opposed to ‘workers’. In their view, it would make more sense to base them on ‘workers’ so that other groups such as agency workers were included. Agency workers were already an undervalued group of employees and, if they were not covered by information and consultation arrangements, this sense of isolation would only be exacerbated.

26. A similar point was made in respect of part-time employees. The proposal in Regulation 4.2(b) that it should be up to employers to decide whether or not to treat employees who worked less than 75 hours a month as half a person for the month in question was wholly inappropriate. First, such a provision appeared to be at odds with the legislation providing for equality of treatment for part-timers. Second, it was not a good advertisement for the way that the DTI appeared to perceive such employees.

27. One trade union representative also raised the issue of companies in receivership. The ICE Regulations did not seem to cover these cases and yet this is where employees were most in need of being informed and consulted.

Information, consultation and negotiation

28. There was a widespread consensus about the need for greater clarity in the definitions of information, consultation and negotiation. In particular, the terms ‘consultation’ and ‘consultation with view to reaching an agreement on decisions’ needed to be clarified. As one participant put it, it was not clear if the latter meant that consultation must almost always involve parties formally reaching a joint agreement. If so, it had significant implications for the timing of consultation and would seem to imply the significance of consultation being a ‘pre-decision making’ process, rather than something that happens after decisions are made. Another asked if it implied that the parties had to agree during the decision-making process or after a decision management had been made. Supposing, for example, employee representatives did not agree to a company decision to acquire another business?
29. At another round table, there was a consensus among both employers and trade union representatives about the need to make the distinction between ‘consultation’ and ‘negotiation’ much clearer. The worry shared by both groups was that non-union representatives with little or no training would become involved in negotiations. This was above all true of redundancy situations. There were also concerns that bodies set up for the purposes of information and consultation might become involved in negotiations, posing another challenge to existing collective bargaining arrangements.

30. Many participants, both management and trade union, felt that the list of issues for consultation set out in the ‘standard’ provisions should be more specific. Some trade union representatives went further, saying it should include discipline and grievance, pensions, equal pay, and health and safety. Some management representatives, by contrast, questioned the viability of coming up with a definitive list of all issues for consultation – one had received one such “list” from their German subsidiary’s works council that ran to over 100 pages. Another suggested that the term “business developments” was too broad and could encompass everything. An employers’ organisation official similarly questioned having to inform employees about processes such as vetting suppliers (which in his interpretation of the Regulations would fall within “business developments”) and consulting with employees at every stage of this process.

31. The special circumstances of foreign-owned companies were also raised in several round tables. One trade union official dealing with a large multinational company described how national-level works councils from several of the company’s European interests often received significantly more information than the British national-level works council, reflecting different national legal frameworks and approaches to consultation. Indeed, they very often received more information than the EWC itself. He stressed a need for a “level playing field” and a means of ensuring that British employees had the same access to information as those in other countries.

32. Some of the managers from foreign-owned companies anticipated that consultation over business developments would be made difficult by the fact that most discussions on business developments did not just take place outside the UK, but also Europe. They wanted to know more, therefore, about the way in which the new ICE Regulations would work in these circumstances. One example given related to a subsidiary company whose pension scheme was looked after by the parent company. If the pension scheme were to change, who would be responsible for informing and consulting employees – the parent company or the subsidiary? If it were dealt with by the UK subsidiary, the question would inevitably arise as to how meaningful the consultation had been, given that the subsidiary had no control over the scheme.

33. At one of the round tables there was criticism of the trigger mechanism from representatives of some of the law firms present. A trigger mechanism, they said, was at odds with, and would not achieve, the Government’s desire to encourage good practice consultation and greater employee involvement. The trigger mechanism was a device that would encourage evasion rather than compliance – it would be very easy for lawyers to advise clients on how they might circumvent the process. It was felt to be overly complicated and legalistic and should be simplified. It might not even comply with the Directive. If the government was committed to the spirit and purpose of meaningful consultation, they should draft Regulations that will effect this.
34. In several instances, trade union representatives felt that having a threshold in the number of employees required to ‘pull the trigger’ was inappropriate – that ‘every employee independently should have a right to be informed and consulted’. In their view, if there had to be a trigger, the number should be reduced. A minimum of 10 employees would be appropriate.

**Negotiated agreements**

35. An issue that cropped up at several round tables was the lack of detail as to how employers might demonstrate that a pre-existing agreement had the approval of the workforce. It was anticipated that this would take the form of a ballot or, more probably, seeking the approval of employee representatives. Such details were urgently needed. Several participants said they were unsure whether they should start planning for implementing the Regulations or wait until the final version was published. Other things being equal, they would like to be proactive. In some cases, however, it was the lack of this kind of detail that was tipping the balance in favour of delay.

**The concept of ‘agreement’**

36. A trade union official also highlighted the lack of clarity around the term “negotiated agreement”. The term “agreement” had proven consistently difficult to define in other areas of employment legislation. It was not clear who the agreement should be with or, indeed, what an “agreement” constituted.

**Role of full time trade union officers**

37. Another trade union official raised the issue of full-time officer involvement in negotiating agreements. The Regulations should make it clear that it should be possible for full-time officials to be fully involved in negotiating agreements if that was what employees wanted.

**The negotiation period**

38. Another trade union concern centred on the possibility of extending the negotiation period beyond 6 months. Arguably, this would make it possible for employers to spin things out indefinitely. The Regulations should provide for total period of 12 months and have done with it.

**Direct and indirect information and consultation**

39. This was an issue on which several participants had concerns about the compatibility of the proposed Regulations with the EU Directive. In one case, it involved a solicitor querying whether an exclusive reliance on direct methods in other than the small undertaking would leave the employer open to a challenge that the undertaking was not meeting the requirements of the Directive, even where there was a 40 per cent endorsement of the arrangements in a ballot. His reasoning was that the Directive was based on the premise that consultation would involve a representative committee. Others expressed the view that the Regulations were adopting an overly generous interpretation of Article 5 of the Directive. Indeed, the Regulations might be said to be contravening the spirit of the Directive. Much of the Directive’s preamble, as well as the build up to the Council decision, they said, made
it clear that the intention was that information and consultation were to take place through employee representatives. In discussing the point, most other participants seemed to assume that, in practice, both direct and indirect forms would be involved in all but the small undertaking.

Standard provisions

40. One trade union representative observed that the ‘standard’ provisions did not contain enough detail. They simply copied out the provisions of the Directive, when they surely needed to go further if many of the uncertainties being raised were to be clarified.

Compliance and enforcement

41. The participants at one of the round tables were particularly concerned about this. Queries were raised about the mechanisms for enforcing the Regulations and whether or not there were sufficient teeth to ensure that they were put into practice. There was also discussion about the interaction between the EAT and the CAC and whether the CAC would need a regional dimension to handle cases under the Regulations. There was also some debate about the implications for the independence of the CAC in view of the proposal that any fines collected from employers would be payable to the Secretary of State.

Penalties

42. A comment from many of the trade union and some lawyer participants was that a penalty of £75,000 was inadequate for the large companies. Against this, many of the Chambers of Commerce and employers’ organisations representatives said that a penalty of this size could bankrupt many SMEs.

Confidential information

43. Discussion about confidentiality figured prominently at many of the round tables. A number of trade union officials said that employer’s concerns expressed about the handling of confidentiality were largely unfounded and there would be few problems. Consultation over confidential issues currently worked well where high levels of trust exist: trust between managers and representatives, and where employees trust that their representatives are accurately conveying workers’ interests to management, while also acknowledging that representatives can’t share all information with them. In their view, there needed to be something in the Regulations to prevent abuse of the confidentiality clauses by employers. If a clause is wide-ranging, employers may define everything as confidential and use this as an excuse to not consult over substantive matters. They highlighted employers’ use of the Take-over Panel’s rules in particular – far too many employers tried to hide behind these, when the rules did not warrant it.

44. Managers from US-owned companies responded that it was important to remember that it was not just a question of UK stock exchange rules that had to be taken into account. Those of the New York Stock Exchange were much stricter on the issue than those of the London Stock Exchange and senior managers could find
themselves in prison if they released sensitive information before informing the market.

45. Worries were also expressed about the possible impact of the confidentiality provisions on employee representatives. In practice, it was going to be difficult enough to get employees to stand as representatives. Binding representatives to a confidentiality clause in the way proposed would make it even more difficult. Moreover, it would mean that representatives would be put in a difficult position – they would not be able to tap into the knowledge and experience of the workforce in general, if they were to be forbidden from giving information to employees or seek input from them.

46. One of the managers said that there was a not dissimilar problem in the public sector. She was often told that government rules prevented her organisation from consulting or negotiating with trade unions on some issues until funding had been agreed with central government and the Treasury. This sort of delay was not allowed for in the proposed Regulations, however, and so there could potentially be problems. It was an issue on which central government would need to give guidance to its departments and agencies.

Rights and responsibilities of employee representatives

47. Some company participants made the point that the Regulations and accompanying consultation document had a lot to say about the responsibilities of employers but less to say about the responsibilities of the employee representatives. If the new Regulations were to be introduced successfully, more needed to be said about the roles and responsibilities of employee representatives.

48. A number of participants said that a major weakness of the Regulations was the lack of provision for a statutory right for paid time off for training. Under the collective redundancy Regulations, employee representatives had a right to training. In the case of the standard arrangements under the ICE Regulations, however, there appeared to be no such provision. Particularly problematic was the absence for training for non-union representatives.

49. Others said that, although there was adequate protection in the Regulations for those acting as employee representatives, this protection did not extend to those who initiated the trigger mechanism. They felt that these workers should also be specifically protected. The provision for the anonymity of employee representatives who approached the CAC to set up consultative committees was not seen as much protection – names would almost inevitably emerge once detailed discussions began.

50. A further point involved the importance of feedback by employee representatives to employees. Provisions for this needed to be made in the Regulations to allow employee representatives to effectively communicate with the workforce. Otherwise, consultation could be a pointless exercise. Feed-back to the wider workforce, said others, should be on a ‘joint’ basis.

Advice and guidance

51. There was a widespread consensus about the need for more advice and guidance on many of the issues covered in the Regulations. Details of the particular subjects
appear below. At the same time, though, there were worries about information overload. Information needed to be relevant, otherwise employers and employees would not see the point. Unfortunately, many of the people who mattered would not necessarily welcome being told that even more onerous responsibility was about to be heaped on their shoulders – whether they be managers or employee representatives.

52. Others said they hoped the Regulations would be accompanied by a major publicity campaign. Employees needed to know their rights, while more should be done to explain the benefits of effective information and consultation arrangements to employers, particularly non-unionised SMEs. Some HR managers in particular were looking for arguments that they could use to get their boards to take the subject seriously. In addition, said some, Acas should be encouraged to produce materials that emphasised the spirit of what was being proposed rather than the letter of the law. The flexibility available within the Regulations to arrive at information and consultation arrangements tailored to suit the particular circumstances of undertakings should also be stressed.

The subjects of advice and guidance

Undertaking

53. Notwithstanding recognition of the problems raised earlier, there was a strong feeling that further clarification was needed of the term ‘undertaking’. Everything that could be done should be done to minimise having to wait for legal judgements.

Providing for employee representatives

54. Participants at several round tables emphasised the need to fill in the details on issues such as the election of employee representatives and the determination of their constituencies. They also said they would particularly welcome guidance on time off and training arrangements for information and consultation representatives, the remuneration to be paid for such time off and the facilities to be made available to employee representatives. In some cases, the discussion went further to include the determination of employee representative’ constituencies and tenure. The constitutions of committee structure were also raised.

The overlap between consultation and negotiation

55. The widespread consensus about the need for greater clarity in the definitions of information, consultation and negotiation has already been mentioned. In particular, it was suggested that the boundaries between consultation and negotiation might best be clarified using case examples.

Confidentiality

56. The significance of the Stock Exchange and the Takeover Panel’s rules has also been discussed above. Here several participants said that there appeared to be so much misunderstanding that it was vitally important to have a clear statement of these arrangements and their implications. Otherwise, the different interpretations being put forward would be a constant source of friction. The same was true of sensitive central government information in the public sector. Altogether, there was a need for clarification around confidentiality and its handling, with ‘good practice’ examples being provided.
The form of advice and guidance

57. Although there was a clear consensus about the need for advice and guidance, there was less agreement about the form. At the risk of over-simplification, there were two main groups, which roughly corresponded with large and small companies. Most large companies were looking for good practice advice on how to handle situations – they were approaching the issues from an employment relations as opposed to a legal perspective. Negotiators needed as much flexibility as possible to tailor arrangements to suit their particular circumstances and key practical issues should not be left to case law. Representatives of SME’s, notwithstanding complaints about too much Regulation, wanted further clarification of the law even if this meant more issues being the subject of the legislation. Some of the Chambers of Commerce and employers’ organisation representatives said the primary concern of many of their members was to ensure that they were legally compliant. The larger companies, with their established HR departments, might be able to take advantage of the flexibility to negotiate agreements. For many SMEs, however, the prospect of such negotiations was daunting.

58. A flavour of this debate was repeated in discussion about whether Acas should be asked to issue a Code of Practice. In most cases, there was strong support for Acas to produce such a code as a vehicle for dealing with many of the points of clarification. In others, however, it was pointed out that in a key sense a Code of Practice might be against the ethos of the framework agreement emphasising that ‘one size does not fit all’. Arguably, a Code of Practice, like further detailing of the Regulations, would undermine the spirit of voluntary agreements. It could come to be seen as a legal ‘stick. Moreover, it was suggested, many of the points might be better handled by other means, which included the following:

- a ‘book’ of definitions – in particular, dealing with information, consultation and negotiation
- a set of ‘model’ agreement/structures/mechanisms reflecting size and sector
- advice on the options for establishment or undertaking level structures
- advice on the handling of ‘mixed constituency’ arrangements
- an audit tool to cross check against existing agreements
- ‘good practice’ case studies
- a benchmark system.

Acas might also help to facilitate joint groups to establish guidance/checklist/bullet point lists, along with ‘good practice’ case studies.

The major challenges facing practical implementation of effective information and consultation arrangements

59. As in the case of the DTI’s 2002 consultation exercise, there was considerable consensus coming out of the round table discussions that a lack of trust between management and employees and employee representatives was the single biggest obstacle to the effective implementation of information and consultation arrangements. Entrenched views, resistance to change and lack of experience were also cited. ‘Apathy’ was also a word that cropped up on many occasions. Very often employees knew what could and should be done, but did not say because previous experience had taught them that managers did not listen or were even hostile to
suggestions. Equally, managers did not persist with consultation if their experience was that they did not get a positive response. Nothing less than a major cultural change was needed, suggested many, because there was little or no tradition of regular and systematic dialogue in many organisations. The emphasis on the sharing of business information was seen as especially significant in this context and all parties would need to adapt if there was to be a serious prospect of reaping the benefits. One major challenge would be to encourage managers to consult at the earliest possible opportunity and not after decisions had been made. It would also take time – the cultural change needed was certainly not going to happen overnight.

60. An employers’ organisation representatives said that close contact with German colleagues suggested that the entire workforce needed to be involved in information and consultation if they were going to be effective. Currently in the UK the focus was mainly on traditionally unionised groups. But there were other groups that would have to be brought within the net, which would mean confronting the ‘mixed constituency’ problem raised earlier – critically important were technical/specialist groups and managers themselves. Finding ways and means of involving everyone, without introducing a battery of procedures, was going to be perhaps the most difficult task.

61. One of the main challenges, many said, would be to ensure that people came forward to serve as representatives. It was here that apathy was a problem particularly amongst non-unionised employees – too many were content to leave involvement in information and consultation to their unionised colleagues. Some saw the new Regulations as an opportunity to re-engage with groups of workers who had become disenfranchised, such as part-timers and low paid workers, but innovative means would have to be found to spark their interest. Fear of victimisation would be a major factor, as would worries about the competency to do the job. Because, agreed many employer and trade union participants, being an employee representative was extremely demanding - representatives commonly feared that they are not meeting employees’ expectations and were very vulnerable to accusations of being co-opted by management or having made the wrong decision.

62. The great danger, observed several participants, was to see information and consultation as a problem for the HR function. Information and consultation needed to be built into the management process – it was a line management issue that needed to be integral to the fabric of strategic thinking, not simply a bolt-on after-thought. Information and consultation needed to be driven from the top by the most senior managers, with operations managers also assuming a key role. Senior trade union officials and lay representatives also had a key role to play in promoting the benefits of information and consultation. Several people made the comparison with health and safety - information and consultation should be seen as everybody’s responsibility. Information and consultation was something that most people did to a greater or lesser extent any way. In many cases, it was largely a question of doing it better – of emphasising information and consultation’s ‘win-win’ potential.

63. There was an overwhelming consensus that education and training would have a critical role to play in addressing the many cultural and practical concerns that had been expressed. It was not just a question of the ‘know how’ that employees and their representatives would need to interpret financial and business information, however. One strand centred on the need for employees and managers, particularly line managers, to have training covering understanding of the Regulations, the processes of information, consultation and negotiation, and the skills required. A second, which came particularly strongly from some of the Chamber of Commerce and employers’ organisation representatives, emphasised the importance of all-round managerial
skills in SMEs in particular. The problem continually cropped up with anything to do with human resources. There was a fundamental problem in getting the message across that investment in people was in the interest of the business – publicity and 'good practice' materials were considered crucial in improving understanding. Persuading SMEs of the advantages of investing in information and consultation would be much more difficult than some people seemed to think.

64. Many participants were also in favour of joint approaches to education and training. If each stakeholder group conducted its own programmes, the great danger was that managers and employees could end up with a different interpretation of the issues, which was in no one's interests. Here there was a responsibility on trade unions and employers’ organisations, together with Acas, to work together to develop joint programmes.

65. Overall, there was a consensus that there was a need to lobby for more support for training and more incentives for training. A trade union official gave examples of government support for local training initiatives, adding that if the government was prepared to devote resources to these, perhaps they could also do so to training education and training initiatives involving the ICE Regulations. An employers’ organisation official stated that, given that business responds to the bottom line, perhaps some kind of financial incentive should be offered for companies (particularly non-union) adhering to a code of practice or equivalent; for example by allowing costs involved in training managers and employees to be offset against tax.

Acas Strategy and Research and Evaluation Units
November 2003
Annexe 1

The Acas ICE round tables

Invitation letters were sent out in the week immediately following the publication of the proposed Regulations on 7 July, each Acas Region deciding the number, location and list of invitees using a common template. In some cases, the roundtables were based on established forums; in others, they represented a ‘first’ initiative. Typically, representatives from companies, employers' organisations, Chambers of Commerce, trade unions and regional agencies were involved, together with academics from IR/HR departments. Altogether, 17 events were held in September and October, the details being shown below, with the number of participants ranging from 12 to 20. In each case, participants were supplied with a copy of the DTI’s Consultation Document, together with a list of questions for discussion, details of which follow the table.

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<tr>
<th>Region</th>
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<td>London</td>
<td>Euston Tower</td>
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Annexe 2

Questions discussed at the Acas round tables

1. What do you and/or your members see are the main issues arising from implementing the Regulations? Are there any changes that you/they would recommend, bearing in mind the provisions of the EU directive from which the Regulations are derived?

The DTI has raised a number of issues that are included in the listed below. It would be helpful to know, though, if there are other major issues that you anticipate will be involved in implementing the Regulations.

2. What impact do you expect the Regulations will have on existing information and consultation arrangements, in particular those involving agreements with unions, and what, if anything, should be done about this?

These questions arise because an employee request (or employer notification) under the information and consultation Regulations could have significant implications for existing arrangements and/or agreements. An employee request might be made, for example, because the employees making it were not covered by the existing agreement or agreements. Or it could be because those agreements did not fully cover the subjects or provide for the type of information and consultation to which employees are entitled under the legislation.

3. Do you see problems arising from the potential overlap between the proposed and existing information and consultation requirements? How might such problems be alleviated – do you think that, in practice, organisations will integrate their arrangements?

There are already legislative requirements to inform and consult representatives of employees, notably those dealing with collective redundancies and transfers of undertakings. There is potentially an overlap between these provisions and the requirements of Article 4.2(c) of the directive which requires information and consultation to cover decisions on collective redundancies and transfers of undertakings that are likely to lead to substantial changes in work organisation or in contractual relations.

4. Do you see problems arising from basing the Regulations on undertakings as opposed to establishments or groups of undertakings? What might be done to deal with these?

The Government has chosen to apply the directive to undertakings, that is, to entities with their own separate legal identity and a number of provisions in the proposed Regulations assume that information and consultation will be organised at the level, e.g. the figures endorsing an employee request. However, in many organisations it may be more appropriate to organise information and consultation at a level other than that of the individual undertaking. It should be possible to agree such arrangements under a negotiated or a pre-existing agreement. Some modifications to the proposed Regulations may be needed, though, to achieve the objective of allowing pre-existing and negotiated agreements that operate at these other levels.

5. What sort of guidance on the legislation would you find useful? Is therefore anything else that you think Acas should be doing besides what is proposed?

Acas will be running training sessions throughout the country covering and encouraging good practice as well detailing the legal requirements. Acas also stands
ready to assist organisations when introducing new, or revising existing, policies, procedures and practices, with the option to design and deliver customised training to ensure such mechanisms are effective and sustainable. There will also be a new Advisory Booklet, dealing with the specific issues that will need to be considered when negotiating an agreement under the Regulations.

6. What do you think are the major challenges facing the practical implementation of effective information and consultation arrangements? How might they be dealt with?

There was considerable consensus coming out of the roundtable discussions that a lack of trust was the single biggest obstacle. Entrenched views, resistance to change and lack of experience were also cited. The main message was that effective information and consultation arrangements would require both managers and employee representatives to develop their knowledge and skills, and that training for both would be important.